No. 83-70

In The

Supreme Court of the United States

OCTOBER TERM, 1983

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

-vs-

FLOYD SANTNER, M.D.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

VRAM NEDURIAN, JR.
Assistant District Attorney
(Counsel of Record)

DENNIS C. McANDREWS
Assistant District Attorney

JOHN A. REILLY
District Attorney
Delaware County

Court House
Media, PA. 19063
(215) 891-4210

THE SUPERIOR APPELLATE PRINTING COMPANY
P O BOX 383
CRANBURY N J 08512
AREA CODE 609
443-4202

QUESTIONS PRESENTED

1. Do the Fourth and Fourteenth Amendments to the United States Constitution require that a search warrant set out with exacting particularity the precise items to be seized where it is only reasonably possible to relate the generic class of such items, especially where the subjects of the search are business records of a pervasive criminal enterprise?

2. Whether the Fourth and Fourteenth Amendments to the United States Constitutions mandate that where a search warrant is arguably overbroad, i.e. permits siezure of items whose precise identity is not adequately particularized in the probable cause affidavit to the warrant, that all items seized via the warrant must be suppressed, including those items for which particularized probable cause was plainly established?

3. Whether a Writ of Certiorari should issue to resolve the above questions upon which conflicting decisions have been rendered by the Circuit Courts of Appeals and by the highest state courts of the nation?

4. Whether the Fourth and Fourteenth Amendments to the United States Constitution mandate suppression of articles siezed by a police officer in good faith reliance upon a lengthy and detailed search warrant approved by a magistrate, but later held to be overbroad by an appellate court?

TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

Pennsylvania Cases — Page

Other Cases

Constitutional and Statutory Provisions

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1983

NO. _____

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

VS.

FLOYD SANTNER, M.D.,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner, the Commonwealth of Pennsylvania, respectfully requests that a Writ of Certiorari issue to review the Judgment and Opinion of the Superior Court of Pennsylvania entered in this case.

OPINIONS BELOW

The Opinion below and Judgment of the Pennsylvania Superior Court, which is unofficially reported at 454 A.2d 24 (Pa.Super. 1982), but which has not yet been officially reported, is set forth in full in Appendix B infra at _____. The Opinion below of the Delaware County Court of Common Pleas is reported at 68 Del.Co. Rptr. 366 (1980), and is set forth in Appendix C, infra at _____.

STATEMENT OF JURISDICTION

The judgment of the Pennsylvania Superior Court was entered on July 9, 1982. The Pennsylvania Supreme Court refused review of this matter by Orders dated March 3, 1983, and May 18, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Four, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment Fourteen, Section One, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Beginning in the fall of 1977, the Upper Darby Police Department received complaints from residents in the neighborhood of Dr. Floyd Santner's office regarding the large number of young patients and friends frequenting the office [R. 601a, 644a, 650a, 779a],* some of whom appeared to be intoxicated. [R. 631a]. Police surveillance revealed that many of the people who entered and left Dr. Santner's office went immediately to the Long Lane Court Pharmacy where prescriptions were tendered and filled by the pharmacist. [R. 628a, 754a].

Examination of the Long Lane Court Pharmacy records indicated that Dr. Santner was prescribing a huge volume of Class II drugs, drugs defined at 35 P.S. §780-104(2)

* "R" refers to the Trial Notes of Testimony.

as drugs with a high potential for abuse. During the month from September 16 to October 18, 1977, 595 prescriptions for such Class II drugs were filled in that single pharmacy pursuant to Dr. Santner's orders. For the same time period, only 65 prescriptions for Class II drugs were filled in the same pharmacy pursuant to orders from all other doctors. [R. 943a]. Furthermore, several dozen of Dr. Santner's patients obtained prescriptions for Class II drugs on a continuous basis over a period of many months. [R. 2327a].

Upper Darby police officers executed a search warrant* on February 28, 1979, and secured patient records, financial ledgers and billing information from Dr. Santner's office. [R. 1237a]. The information contained in Dr. Santner's records

* This search warrant is reproduced in full at Appendix A.

further documented the fact that the doctor prescribed huge amounts of controlled substances on a continuous basis, including Quaaludes, Doriden, Robitussen, Valium, [R. 2672a], and the information also revealed that the high volume of patients who visited the office necessarily precluded anything but cursory examination of the patients at the time the prescriptions were written. [R. 1327a].

As a result of this investigation, Dr. Santner was arrested on February 28, 1978, and charged with 1) Prescribing Controlled Substances to Drug Dependant Persons, 35 P.S. §780-113(a)(13), 2) Prescribing Controlled Substances in the Course of Professional Practice Outside the Scope of Patient Relationship and Outside of Responsible Treatment Principles, 35 P.S. §780-113(a)(14), and 3) Criminal Conspiracy, 18 P.S. §903.

Dr. Santner was arraigned on April 5, 1978, and an omnibus pre-trial motion alleging that the search warrant was overly broad and in violation of Dr. Santner's federal constitutional rights was filed on July 11, 1978. Following a hearing on the motion on April 2-4, 1979, the motion was dismissed on June 22, 1979. The matter was tried before the Honorable Robert F. Kelly, sitting with a jury from September 7, 1979 until October 5, 1979, when the jury returned guilty verdicts as to the charges under 35 P.S. §780-113(a)(13) and (14).

Post-verdict motions were filed on October 15, 1979, and supplemental motions were filed together with Dr. Santner's brief on April 16, 1980. These motions were denied on July 21, 1980, Commonwealth v. Santner, 68 Del. Rep. 366 (1980), and Dr. Santner was sentenced on October 14, 1980,

to a minimum period of incarceration of two years and a maximum of four years together with a fine of $20,000.

Notice of appeal to the Superior Court of Pennsylvania was filed on October 16, 1980. On July 9, 1982, the Superior Court at 454 A.2d 24 (1982) reversed Dr. Santner's conviction on the sole basis that the search warrant which gave rise to the seizure of the defendant's records was overly broad and violative of the Fourth Amendment to the United States Constitution. The Pennsylvania Supreme Court denied the Commonwealth's Petition for Allowance of Appeal on March 3, 1983. The Commonwealth then timely filed an Application For Reconsideration of Denial of Petition For Allowance of Appeal, and the Pennsylvania Supreme Court denied that Application on May 18, 1983. The Commonwealth of Pennsylvania now seeks this Court's review of the Superior Court's Opinion and Order.

REASONS FOR GRANTING THE WRIT

A. THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION DO NOT REQUIRE THAT SEARCH WARRANTS SET OUT WITH EXACTING PARTICULARITY THE PRECISE ITEMS TO BE SEIZED WHERE IT IS REASONABLE TO DESCRIBE SUCH ARTICLES BY GENERIC CLASS.

The question presented here is whether the United States Constitution requires that search warrants for the seizure of items within a particular generic class describe those items with precision and exacting particularity. In the instant case the items to be seized were the business records of a medical doctor; the investigation as set forth in the affidavit of probable cause to the search warrant revealed that the doctor's "practice" was actually a pervasive criminal activity in the form of a "drug mill" wherein "patients" would enter the doctor's offices and promptly

receive a prescription for controlled substances with a high potential for abuse. The Commonwealth respectfully contends that the seizure of the doctor's records was justified under the extensive investigation as set forth in the affidavit of probable cause, and under this Court's prior interpretation of the "overbreath doctrine" as set forth in Andresen v. Maryland, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976).

In adopting the rationale set forth in the Superior Court's opinion below, Pennsylvania has joined a minority of states and circuit courts which have interpreted the Fourth Amendment to require exacting precision of police officials in delineating the items to be seized via a search warrant.[1] However, a majority of states and circuit courts[2] continue to

---

[1] Due to the relative length of the substantive footnotes herein, these footnotes are identified by number and appear at the conclusion of the Argument portion of this Petition.

utilize a more practical and realistic approach to the Fourth Amendment and to the necessities of responsible law enforcement by requiring only a reasonable degree of specificity considering the circumstances of the case and any exigencies attendant thereto. Furthermore, the opinion below appears to place Pennsylvania at odds on the overbreadth issue with its own Third Circuit Court of Appeals which has enunciated standards concerning search warrant overbreadth in an Opinion released shortly after the opinion below in the instant case. United States v. Christine, 687 F.2d 749 (3rd Cir. 1982).

The difficulties presented by the opinion of the lower court and by the minority view in banning searches for a general class of items are apparrent. Law enforcement officials frequently have more than adequate probable cause to know that a

generic class of items exists in the place to be searched; classic examples of such instances are drug laboratories and gambling halls. In such cases, police are usually able to articulate facts, often via a variety of sources, which plainly establish probable cause to believe that contraband of a particular class will be found in the place to be searched. However, given the nature of the operation which is the subject of the investigation, it is frequently impossible to state with mathematical precision the precise items to be seized; in such cases such generic terms as "controlled substances" or "gambling paraphernalia" should be considered reasonably particularized descriptions of the items to be seized. Along these lines, the questions of overbreadth and the requisite particularity become especially troublesome where the criminal activity is both complex and provasive; i.e. where, as in the instant case, police investigation reveals that the

defendant is taking part in a pervasive criminal activity which can be established via a particular class of his records. Naturally, in these circumstances a particular description of the exact documents to be seized is plainly impossible. The minority of jurisdictions which hold that a strict and particularized description of each item to be seized must be given in such cases effectively negates the "reasonableness" clause of the Fourth Amendment, and permits criminal enterprises to hide behind the complexity of their schemes. These minority jurisdictions ignore the fact that there is a vast difference between the "general warrants" proscribed by the Fourth Amendment, and a carefully drafted search warrant which does not request a general rummaging of the defendant's effects, but rather seeks to search only for a generic class of

items such as records indicative of specified criminal activity, controlled substances, or other stated forms of contraband or evidence.

While the lower court recognized that "the law is largely unformed in this difficult", Slip Opinion at 18, the court ignored substantial case law for the proposition that the Fourth Amendments standards of particularity and specificity in delineating the items to be seized via a search warrant is lessened where the items at issue are difficult or impossible to describe with mathematical precision. United States v. Sharfman, 448 F.2d 1352 (2nd Cir. 1971); United States v. Jacob, 657 F.2d 49 (4th Cir. 1981, cert. denied, 455 U.S. 942, 102 S.Ct. 1435, 71 L.Ed.2d 653 (1982); United States v. Brien, 617 F.2d 299 (1980), cert. denied 446 U.S. 919, 100 S.Ct. 1854, 64 L.Ed.2d 273. Furthermore, the lower court refused to consider the fact that while a large quantity of items were targeted for

seizure in the warrant, only those items whose seizure was supported by probable cause (i.e., those papers dealing with the defendant's "treatment" of his "patients", and not unrelated personal or financial records) were subject to seizure. Additionally, the lower court ignored case law from the majority jurisdictions which hold that where there is probable cause to believe that a dominant portion of records or items to be seized is evidence of crime or fruits or instrumentalities thereof, a less rigorous standard is demanded regarding specification of the items to be seized. Brien, supra; United States v. Dennis, 625 F.2d 782 (8th Cir. 1980); United States v. Cortelleso, 601 F.2d 28 (1st Cir. 1979); Grimaldi v. United States, 606 F.2d 332 (1st Cir. 1979). Finally, the lower court places great significance upon the fact that the Commonwealth selected only the strongest pieces of evidence and introduced those

exhibits at trial as showing that the Commonwealth took vast quantities of irrelevant documents; such a determination ignores the particular and peculiar facts of the instant case, the practical requirements of trial tactics and advocacy, and Supreme Court authority for the proposition that the mere fact that some items seized may not, in the final analysis, be of evidentiary value does not render an entire search invalid. Andresen v. Maryland, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976) at n.11.

B. THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION DO NOT REQUIRE THAT WHERE A SEARCH WARRANT IS OVERBROAD, i.e. PERMITS SEIZURE OF ITEMS BEYOND THOSE PARTICULARIZED IN THE PROBABLE CAUSE SECTION OF THE WARRANT THAT ALL ARTICLES SEIZED BE SUPPRESSED, INCLUDING THOSE ITEMS FOR WHICH PARTICULARIZED PROBABLE CAUSE WAS PLAINLY ESTABLISHED; ONLY THOSE ITEMS IMPROPERLY SEIZED NEED BE SUPPRESSED.

In the opinion and Order of the Court below, the Pennsylvania Superior Court ordered the suppression of all items seized via the execution of the purportedly overbroad warrant in question; the Superior Court did this despite an express finding on the part of that Court that the warrant presented adequate probable cause and particularity to seize many items named within the four corners of the warrant and

which were seized by the officers in the execution thereof. Santner, 454 A.2d at 30. In so doing, the Superior Court adopted the position of a small minority of states[3] which hold that an overbroad warrant may not be severed into two categories - those items seized via adequate probable cause and particularity, and those items seized as a result of the overbreadth. However, a majority of jurisdictions[4] permit such severence of an overly broad warrant so as to permit the evidentiary use of properly seized items (i.e. those adequately described and particularized within the warrant), and the suppression of only those items improperly seized. While this Court in Andresen v. Maryland, supra, at n.11, appeared to approve of the severance practice utilized in the majority of jurisdictions, a significant division among the states and circuit courts has arisen nonetheless regarding this practice.

The practice of severing, or as it is sometimes called, "redacting", Christine, supra, those items which were improperly seized as a result of overbreadth and search warrant from those items which were properly seized under the more particularized portions of the warrant, is a reasonable and common-sense approach to dealing with warrants which are largely sufficient and proper, yet which include an area of generality or impropriety. The United States Court of Appeals for the Third Circuit synopsized the principle of severance, or redaction, in Christine, supra, where it stated as follows:

> "By redaction, we mean striking from a warrant those severable phrases and clauses that are invalid for lack of probable cause or generality and preserving those severable phrases and clauses that satisfy the Fourth Amendment. Each part of the search authorized by the warrant is examined separately to determine whether it is impermissibly general or unsupported by probable cause. Material seized under the authority of those parts of the

> warrant struck for invalidity must be suppressed, but the Court need not suppress materials seized pursuant to the valid portions of the warrant."

Christine, 687 F.2d at 754.

The concept of severance, or redaction, of overbroad warrants is an efficacious and constitutionally sound practice for a number of reasons. First, the suppression of only those items seized in contravention of the defendant's constitutional rights is well grounded hisrotically, See, e.g., United States v. Dunloy, 584 F.2d 6, 11 n.4 (2nd Cir. 1978); United States v. Forsythe, 560 F.2d 1127 (3rd Cir. 1977); United States v. Mendoza, 473 F.2d 692, (5th Cir. 1972); Andresen v. Maryland, 427 U.S. at 482 n.11, 96 S.Ct. at 3749 n.11, and served the purposes of the exclusionary rule. Under such a practice, items which have been improperly seized from the defendant are suppressed, and law enforcement officials are thus deterred from further violations of the

defendant's constitutional rights; however, those items which have been properly seized are permitted to be used by law enforcement officials against the defendant, thus preventing the defendant from receiving a windfall benefit for what is often an inadvertent or technical error.

Second, the use of severence or redaction encourages law enforcement officials to utilize warrants in making searches in the courses of their duties. If law enforcement officials realize that they will be punished only for their blunders, and not be punished in a sweeping manner by the courts without regard for the properly drafted portions of warrants, police officers will thereby be encouraged to rely upon warrants issued upon judicial approval rather than upon consent searches or upon exigent circumstances in effecting desirec searches. A contrary policy would, of course, have the undesirable effect of

discouraging police from utilizing search warrants. Such a result is supportable by neither nor the Constitution, and should not be countenanced.

Third, the practice of severance is consistent with the very foundation of the warrant requirement to the United States Constitution in that a) the intrusion into personal privacy has been justified by presenting probable cause to a judicial authority, b) the scope of the search actually conducted has, while broader than proper, nonetheless been limited by the terms of the magistrate's authorization, c) the individual whose property has been seized has received notification of the lawful authority of the executing officer and of his need to search, and d) a judicial record has been generated in the form of the warrant so as to facilitate subsequent judicial review. Consequently, the practice

of severence should be seen as a valuable accommodation between the rights of the individual criminal defendant and of society, and obviates the enormous societal loss which would result from the suppression of all evidence seized from the criminal defendant, including those items seized pursuant to the valid portion of the warrant.

C. WHERE POLICE OFFICERS ACT IN GOOD FAITH RELIANCE UPON A SEARCH WARRANT DULY APPROVED BY A MAGISTRATE, EVIDENCE SHOULD NOT BE SUPPRESSED UPON A LATER FINDING BY ANOTHER COURT THAT THE SEARCH WARRANT WAS DEFECTIVE.

Finally, the Commonwealth would respectfully contend that the instant matter is an appropriate case for this Court to reconsider the exclusionary rule in circumstances where law enforcement officials act in good faith reliance upon a duly issued search warrant. See, Gates v. Illinois, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (filed June 8, 1983). While the Commonwealth concedes that this assertion is raised for the first time on appeal, no opportunity previously existed for the Commonwealth to raise this issue, inasmuch as it prevailed at the trial court level without

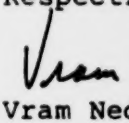
need to assert "good faith", and the Pennsylvania Superior Court was powerless to decide this issue in a manner contrary to prior United States Supreme Court authority that the good faith of the police officer in executing an invalid warrant is irrelevant. See, e.g. Mapp. v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 6 L.Ed.2d 1081 (1961). Furthermore, inasmuch as the Pennsylvania State Constitution's guarantee against unreasonable searches and seizures has been interpreted to be coextensive with the United States Constitutions Fourth Amendment, the lower court was effectively precluded from deciding any good faith issue upon the Pennsylvania Constitution, even if it chose to ignore the established United States Supreme Court Authority. Commonwealth v. Smyser, 205 Pa.Super. 599, 211 A.2d 59 (1965); Commonwealth v. Barba, ___ Pa.Super. ___, ___ A.2d ___, (filed April 22, 1983). Consequently, inasmuch as no reasonable opportunity has previously existed to raise the good faith

of the officers as an exception to the exclusionary rule, it is respectfully submitted that the instant matter is an appropriate case for this Court to determine whether the good faith of an officer relying upon a duly executed search warrant should be permitted to vitiate the suppression of the fruits of a search under an improper warrant.

CONCLUSION

For all the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,



Vram Nedurian, Jr.
Assistant District Attorney
(Counsel of Record)

Dennis C. McAndrews
Assistant District Attorney

John A. Reilly
District Attorney

Court House

Media, Pennsylvania 19063

(215) 891-4210

[1] The minority view is expressed in the following opinions of the various states and Circuit Court of Appeals adopting this view; State v. Hoffman, 273 Ark. 111, 617 S.W.2d 16 (1981); State v. Carmel, 169 N.J. Super 370, 404 A.2d 1227 (1979); Lockridge v. Superior Court, 275 Cal. App.2d 612, 80 Cal. Rptr. 223 (1969); In Re 1969 Plymouth Roadrunner, 455 S.W.2d 466 (M.O. 1970); Kinsey v. State, 602 P.2d 240 (Okla. Crim. 1979); State v. Kealoha, 62 Hawaii 166, 613 P.2d 645 (1980); State v. Sweatt, 427 A.2d 940 (Me. 1981); Appeal after remand, 444 A.2d 361, cert.den. ___ U.S. ___, 103 S.Ct. 71, ___ L.Ed.2d ___; Montilla Records Of Puerto Rico, Inc. v. Morales, 575 F.2d 324 (1st Cir. 1978) (but see conflicting First Circuit case in footnote 2, infra); United States v. Cook, 657 F.2d 730 (5th Cir. 1981) (but see conflicting fifth Circuit case cited in footnote 2, infra); VonderAhe v. Howland, 508 F.2d 364 (9th Cir. 1974) (but see conflicting Ninth Circuit case cited in footnote 2, infra).

[2] The following state courts and Circuit Court of Appeals have adopted the majority view; State v. Withers, 8 Wash. App. 123, 504 P.2d 1151 (1972); People v. Wolski, 83 Ill. App.3rd 17, 38 Ill. Dec. 297, 403 N.E.2d 528 (1980); Strauss v. Stynchcombe, 224 Ga. 859, 165 S.E.2d 302 (1968); State v. Clark, 281 N.W.2d 412 (S.D. 1979); State v. Salsman, 112 N.H. 138, 290 A.2d 618 (1972); People v. Schmidt, 172 Col. 285, 473 P.2d 698 (1970); Commonwealth v. Kenneally, 383 Mass. 269, 418 N.E.2d 1224 (1981); State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972);

State v. Quintana, 87 N.M. 414, 534 P.2d 1126 (1975); Gonzalez v. State, 577 S.W.2d 226 (Tex. Crim. 1979), cert.den. 444 U.S. 853, 100 S.Ct. 109, 62 L.Ed.2d 71; State v. Flood, 301 So.2d 637 (La. 1974); State v. Brown, 205 Kan. 457, 470 P.2d 805 (1970); State v. Rund, 259 N.W.2d 567 (Minn. 1977); Mann v. State, 389 N.E.2d 352 (Ind. App. 1979); United States v. Brien, 6717 F.2d 299 (1st Cir. 1980) cert.den. 446 U.S. 919, 100 S.Ct. 1854, 64 L.Ed.2d 273 (but see First Circuit case to the contrary at footnote 1, infra); United States v. Sharfman, 448 F.2d 1352 (2nd Cir. 1971); United States v. Jacob, 657 F.2d 49 (4th Cir. 1981), cert.den., 455 U.S. 942, 102 S.Ct. 1435, 71 L.Ed.2d 653 (4th Cir. 1982); United States v. Bright, 630 F.2d 804 (5th Cir. 1980) (but see Fifth Circuit case to the contrary in footnote 1, infra); United States v. Dennis, 625 F.2d 782 (8th Cir. 1980); United States v. Honore, 450 F.2d 31 (9th Cir. 1971) (but see Ninth Circuit case to the contrary in footnote 1, infra); United States v. Wuagneux, 683 F.2d 1343 (11th Cir. 1982); In Re Search Warrant, dated July 4, 1977, 187 U.S. App. D.C. 297, 572 F.2d 321 (D.C. Cir. 1977).

[3] The minority view on this issue is reflected in the following cases: Kinsey v. State, 602 P.2d 240 (Okla. Cim. 1979); State v. Carmel, 169 N.J. super 370, 404 A.2d 1227 (1979).

[4] The majority view is represented by the following cases of the various states and Circuit Court of Appeals: State v. Johnson, 160 Conn. 28, 373 A.2d 702 (1970); Aday v. Superior Court of Alaneida County, 55 Cal.2d 789, 13 Cal. Rptr. 415, 362 P.2d 47 (1961) (leading case); United States v. Ketterman, 276 A.2d 243 (D.C. App. 1971); Butler v. State, 130 Ga. App. 469, 203 S.E.2d 558 (1973); People v. Russell, 45 Ill. App.3rd 961, 4 Ill. Dec. 579, 360 N.E.2d 515 (1977); People v. Haas, 55 App. Div. 2nd 683, 390 N.Y.S.2d 202 (1976); State v. Sagner, 12 Or. App. 459, 506 P.2d 510 (1973); State v. Clark, 281 N.W.2d 412 (S.D. 1979); State v. Halverson, 21 Wash. App. 35, 584 P.2d 408 (1978); State v. Maddasion, 130 Ariz. 306, 636 P.2d 84 (1981); State v. Kealohj, 62 Hawaii 166, 613 P.2d 645 (1980); Walthall v. State, 594 S.W.2d 74 (Tex. Crim. App. 1980), United States v. Riggs, 690 F.2d 298 (1st Cir. 1982); United States v. Dunloy, 584 F.2d 6, n. 4 (2nd Cir. 1978); United States v. Christine, 687 F.2d 749 (3rd Cir. 1982) (detailed discussion); United States v. Jacob, 657 F.2d 49 (4th Cir. 1981), cert. denied 455 U.S. 942, 102 S.Ct. 1435, 71 L.Ed.2d 653; United States v. Cook, 657 F.2d 730 (5th Cir. 1981); Sovereign News Company v. United States, 690 F 2d 569 (6th Cir. 1982); United States v. Cardwell, 680 F.2d 75 (9th Cir. 1982); In re Search Warrant Dated July 4, 1977 etc., 66 7 F.2d 117 (D.C. Cir. 1981), cert.denied ___ U.S. ___, 102 S.Ct. 1971, ___ L.Ed.2d ___.

Appendix

AFFIDAVIT OF PROBABLE CAUSE
FOR SEARCH WARRANT C-14134

We, the above affiants, Officers John Falls and Joe Ceccola, members of the Upper Darby Police department,assigned to narcotic investigations,as affiants, hereby request a search warrant issue,for the above described items,based upon the foregoing facts: Within the past 6 or 7 months, numerous complaints were received from concerned citizens in the neighborhood that there was an inordinate amount of traffic by people in their teens, at the above location,and these people would go into the above persons offices come out,congregate on the street,and would lay on the lawns and sidewalks in the area. The complainants indicated that they believed thatthe young people were taking some type of drugs.On numerous occassions the above officers conducted surveillances at the above location. On days of surveillances

the above officers observed many people, some being in their teens. Many of the people in our opinion and experiences as narcotic officers, did appear to be under the influence of some type of drugs. Our surveillances further reveal that almost ninety-five percent to the people that entered and then left the above location went immediately to the Long Lane Court Pharmacy where, as we observed,the prescription written by the above person was tendered to and filled by the pharmacist. We also observed known drug users to this department, those being John Searle,Moe McNally, Greg Searle. On or about the first week of February, 1978, officer John Falls and other officers from this narcotic unit interviewed Mr. Walter Quinn and Raymond Freeberry, who are pharmacists at the Long Lane pharmacy. They permitted us to exaimine their records. Our personal examination of the records revealed

the following:An excessive amount of Class 11 drugs being prescribed by Dr. Floyd A. Santner, for example from February 1,1978 to February 24,1978 15,901 Quaaludes were dispensed, 3,129 Ritalins were dispensed, 903 Percodans were dispensed and 1,023 of other class 11 drugs were dispensed. The total of class 22 drugs dispensed in this 24 day period were 20,966. A check was made with Dr. Philip Ingaglio, who is the current Chairman of the board of physicians, who handles physician licensure for the State of Pennsylvania. Dr. Ingaglio indicated that the drugs prescribed were, and the quantities prescribed as set forth above were outrageously large. Dr. Ingaglio also felt that this type of practice was not keeping with accepted medical standards. A check with 3 other pharmacies in the same general area revealed that the above quantities were also outrageously high.

The above defendant also advertises, on his billing literature, a practice with a Dr. John Sardar M.D. A check of the records in Harrisburg, Penna. concerning the licensing of physicians indicates that Dr. John Sardar is not licensed in the state of Penna. to practice as a physician, and has never been licensed to practice. State Drug Investigation unit agent, Ester Kiah, went to the above location as a patient several times and each of the times was prescribed a class 2 drug . On February 27, 1978 the above officers interviewed a reliable confidential informant, who has given these officers reliable information in the past, which has led to arrests and convictions, and he realted the following. On several pccassions he was a patient at Dr. Santner's office and he did receive Quaaludes, which he was not given a written prescription for , but was told to go to the Long Lane pharmacy to pick them up, which he did.

On February 27,1978 the above officers interviewed on Hogan Jolly and Calvin Blackwell who are both patients of Dr. Floyd Santner M.D. and they related to these officers that are both drug addicted persons and are currently on methadone programs in the city of Philadelphia. Both are obtaining class 2 drugs from Dr. Santner.

On February 27,1978 the above officers also interviewed one Cheryl Rementer and she told us that she went to Dr. Santner last year, when she was 15 years of age and told Dr. Santner that she had problems sleeping at night and Dr. Santner prescribed Quaaludes for her. She stated that she went there because her friends told her its easy to get Quaaludes from Dr. Santner.

Based on the foregoing we have reason to believe that the above person at the above location has violated the laws of Penna. dealing with the licensed practice of medicine and the manner in which the practice is to

be conducted in that he has conspired with John Sardar and Harrison G.STone and to allow them to practice without a license, and based on the quantity of traffic into and from the above office, by surveillance, our examination of pharmacy records and our conversation with the referenced physicians, We believe the above,Dr.Santner, is prescribing controlled substances for known addicts and controlled substances or other drugs not being for maintainance for their addiction. These controlled substances or other drugs being prescribed are not in good faith in the course of his professional practice.

J. 2236/81-1

COMMONWEALTH OF PENNSYLVANIA	:	IN THE
v.	:	SUPERIOR COURT
	:	OF PENNSYLVANIA
FLOYD SANTNER, M.D.,	:	No. 2361
Appellant	:	Phila. 1980

Appeal from the Judgment of Sentence of Court of Common Pleas, Criminal Division of Delaware County, at No. 1123 - 1978.

PANEL CASE

BEFORE: SPAETH, MONTGOMERY AND LIPEZ, JJ.

OPINION BY SPAETH, J.:

This is an appeal from a judgment of sentence for violations of the Controlled Substance, Drug, Device and Cosmetic Act. 35 Pa.C.S.A. §780-101 et seq. Appellant, a medical doctor, was convicted by a jury of dispensing controlled substances to drug dependent persons and of dispensing controlled

substances not in the good faith course of professional conduct. 35 Pa.C.S.A. §780-113 (a)(13) & (14). Appellant argues, among other matters, that the lower court erred in denying his pre-trial motion to suppress evidence obtained from his office because "the search warrants were defective in that they were overly broad in describing the items to be seized and therefore constituted unlawful general search warrants." Appellant's Brief at 6.[1] We agree, and therefore reverse and grant appellant a new trial.

---

[1] Two warrants issued, one authorizing the search of appellant's home, the other the search of his office. Both warrants were based on the probable cause allegations copied at pages 6-9 infra. Only the warrant authorizing the office search is included in the reproduced record and is discussed here.

The particularity clause[2] of the fourth amendment to the United States

---

[2] The particularity requirement prohibits a warrant that is not particular enough and a warrant that is overbroad. These are two separate, though related, issues. A warrant unconstitutional for its lack of particularity authorizes a search in terms so ambiguous as to allow the executing officers to pick and choose among an individual's possessions to find which items to seize. This will result in the general "rummaging" banned by the fourth amendment. See Marron v. United States, 275 U.S. 192, 195 (1927). A warrant unconstitutional for its overbreadth authorizes in clear or specific terms the seizure of an entire set of items, or documents, many of which will prove unrelated to the crime under investigation. The officers executing such a warrant will not rummage, but will "cart away all documents." Application of Lafayette Academy, 610 F.2d 1, 3 (1st Cir. 1979). An overbroad warrant is unconstitutional because it authorizes a general search and seizure. See discussion infra at 4. Of course, the close relationship between these two issues meand that some warrants may contain both defects - ambiguity and overbreadth - and may be held unconstitutional on either ground. See United States v. Abrams, 615 F.2d 541 (1st Cir. 1980) (warrant unconstitutional for lack of particularity, concurring judge would find both defects); Application of Lafayette Academy, supra (discussing relationship between lack of particularity and overbreadth). Although appellant blends these issues, it is clear that his argument is that the warrant was unconstitutional for its overbreadth. Appellant's Brief at 6-15.

Constitution provides in pertinent part:[3]

> [N]o warrants shall issue, but upon probable cause... and particularly describing the the... things to be seized.

The United States Supreme Court has stated that "[t]he requirement that warrants shall particularly describe the things to be seized makes general searches them impossilbe and prevents the seizure of one thing under a warrant describing another." Marron v. United States, 275 U.S. 192, 195 (1927). The "general searches" referred to by the Court represented a practice "which

---

[3] The particularity requirement of the Pennsylvania Constitution, article I, section 8, is slightly different from that of the federal constitution, providing in part that: "[N]l warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause...." The only decision interpreting this requirement holds that it is co-extensive with the federal requirement. Commonwealth v. Smyser, 205 Pa. Superior Ct. 599, 211 A.2d 59 (1965). We agree that if affords at least as much protection, for certainly it may not provide less, and do not consider whether "as nearly as may be" provides more protection.

has been condemned by Americans since Colonial Days." United States v. Abrams, 615 F.2d 541, 543 (1st Cir. 1980). Indeed it was popular dissatisfaction with this practice that lead to the adoption of the fourth amendment:

> It is familiar history that indiscriminate searches and seizures conducted under the authority of "General Warrants" were the immediate evils that motivated the framing and adoption of the Fourth Amendment. Indeed, as originally proposed in the House of Representatives, the draft contained only one clause, which directly imposed limitations on the issuance of warrants, but imposed no express restrictions on warrantless searches or seizures. As it was ultimately adopted, however, the amendment contained two separate clauses, the first protecting the basic right to be free from unreasonable searches and seizures and the second requiring that warrants be particular and supported by probable cause.

Payton v. New York, 445 U.S. 573, 583-4 (1980) (footnotes omitted).[4]

---

[4] In a footnote to this statement the Supreme Court provided additional background:

> Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hatred writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of British tax laws. They were denounced by James Otis as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' because they placed 'the liberty of every man in the hands of every petty officer.' The historic occasion of that denunciation, in 1761 at Boston, has been characterized as 'perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. "Then and there," said John Adams, "then and there the child Independence was born."' Boyd v. United States, 116 U.S. 615, 625, 29 L.Ed. 746, 6 S.Ct. 524." Stanford v. Texas, 379 U.S. 476, 481-482, 13 L.Ed.2d 431, 85 S.Ct. 506.

A warrant is unconstitutional under the fourth amendment for its overbreadth "if it is broader than can be justified by the probable cause on which the warrant is based." LaFave, 2 Search and Seizure 97 (1978). We believe that an examination of the warrant and the affidavit here demonstrates that the warrant authorized a far broadre search than was justified by the probable cause.

The warrant identified the items to be seized as "All Patient/Physician records and charts. All the ledgers and bookkeeping pertaining to patients and visits." The affidavit accompanying the warrant stated the following in the "probable cause" section:

(footnote 4 continued)

Id. 583 n.21. And see, Lo-Ji Sales, Inc. v. New York, 422 U.S. 319, 325 (1979) (warrant which did not particularly describe items to be seized "reminiscent of writ of assistance ofthe 18th century against which the Fourth Amendment was intended to protect.").

Within the past 6 or 7 months, numerous complaints were received from concerned citizens in the neighborhood that there was an inordinate amount of traffic by people in their teens, at the above location, and these people would go into the above persons [sic] offices come out, congregate on the street, and would lay on the lawns and sidewalkd in the area. The complainants indicated that they believed that the young people were taking some type of drugs. On numerous occassions [sic] the above officers conducted surveillances at the above location. On days of surveillances the above officers observed many people, some being in their teens. Many of the people in our opinion and experiences as narcotic officers, did appear to be under the influence of some type of drugs. Our surveillances further revealed that almost ninety-five percent of the people that entered and then left the above location went immediately to the Long Lane Court Pharmacy where, as we observed, the prescription written by the above person was tendered to and filled by the parmacist. We also observed known drug users to this department, those geing John Searle, Moe McNally, Greg Searle. On or about the first week of February, 1978, Officer John Falls and

other officers from this narcotic unit interviewed Mr. Walter Quinn and Raymond Freeberry, who are pharmacists at the Long Lane pharmacy. They permitted us to examine their records. Our personal examination of the records revealed the following: An excessive amount of class 11 drugs being prescribed by Dr. Floyd A. Santner, for example from February 1, 1978 to February 24, 1978 15,901 Quaaludes were dispensed, 3,129 Ritalins were dispensed, 903 Percodans were dispensed and 1,023 of other class 11 drugs were dispensed in this 24 day period were 20,000 Quaaludes are being prescribed by Dr. Santner in an average months [sic] time.

A check was made with Dr. Philip Ingaglio, who is the current Chairman of the board of physicians, who handles physician licensure for the State of Pennsylvania. Dr. Ingaglio indicated that the drugs prescribed were, and the quantities prescribed as set forth above were outrageously large. Dr. Ingaglio also felt that this type of practice was not [in] keeping within accepted medical standards. A check with 3 other pharmacies in the same general area revealed that the above quantities were also outrageously high.

The above defendant also advertises, on his billing literature, a practice with a Dr. John Sardar M.D. A check of the records in Harrisburg,

Pennsylvania concerning the licensing of physicians indicates that Dr. John Sardar is not licensed in the state of Pennsylvania to practice as a physician, and has never been licensed to practice. State Drug Investigation unit agent, Ester Kiah, went to the above location as a patient several times and each of the times was prescribed a class 2 drug. On February 27, 1978 the above officers interviewed a reliable confidential informant, who has given these officers reliable information in the past, which has led to arrests and convictions, and he related the following.

On several occassions [sic] he was a patient at Dr. Santner's Office and he did receive Quaaludes, which he was not given a written prescription for, but was told to go to the Long Lane pharmacy to pick them up, which he did.

On February 27, 1978 the above officers interviewed one Hogan Jolly and Calvin Blackwell who are both patients of Dr. Floyd Santner M.D. and they related to these officers that are both drug addicted persons and are currently on methadone programs in the city of philadelphia. Both are obtaining class 2 drugs from Dr. Santner.

On February 27, 1978 the above officers also interviewed one Cheryl Rementer and she told us that she went to Dr. Santner last year, when she was 15 years of age and told Dr. Santner that she had problems sleeping at night and Dr. Santner prescribed Quaaludes for her. She stated that she went there because her friends told her its [sic] easy to get Quaaludes from Dr. Santner.

Based on the foregoing we have reason to believe that the above person at the above location has violated the laws of Pennsylvania dealing with the licensed practice of medicine and the manner in which the practice is to be conducted in that he has conspired with John Sardar and Harrison G. Stone and to allow them to practice without a license, and based on the quantity of traffic into and from the above office, by surveillance, our examination of pharmacy records and our conversation with the referenced physicians, we believe that the above Dr. Santner, is prescribing controlled substances for known addicts and controlled substances not being for maintainance for their addiction. These controlled substances or other drugs being presecribed are not in good faith in the course of his professional practice.

As may be seen from these allegations, the affidavit identified eight named individuals whom the officers knew or had interviewed; it further identified, although not by name, a class of individuals whose prescriptions were examined at the Long Lane Court Pharmacy; and it specified two periods -- February 1978 and "the past 6 or 7 months" -- as the periods during which the activity in question had occurred. Despite this specificity,[5] the warrant was not restricted either to the files of the eight named individuals, or to the files of the class of individuals whose prescriptions had been examined, or as to time. Instead, it

---

[5] In some cases an insufficiently particular warrant has been "saved" from unconstitutionality by a specific affidavit. Matter of Property, Etc., 644 F.2d 1317 (9th Cir. 1981) (warrant accompanied affidavit and used words of incorporation to clarify lack of particularity). Such cases are inapposite here, however, for while the affidavit is specific, the issue is the warrant's overbreadth, not its lack of particularity.

authorized the seizure of all of the patients' "records and charts," and all "ledgers and bookkeeping pertaining to patients," whether the patients were or were not taking any drugs, and whether they were current patients or had not been patients for many years. The extent of this entirely unnecessary overbreadth may be seen by what happened. The executing officers seized some 3,600 files. Only 50 were introduced in evidence at trial.

While the issue appears to be one of first impression in Pennsylvania, similarly overbroad warrants have been found unconstitutional in the federal courts. See United States v. Abrams, supra (warrant did not specify which medical records could be seized and was not limited as to time); United States v. Roche, 614 F.2d 6 (1st Cir. 1980) (warrant did not specify that only automobile insurance records could be seized);

Application of Lafayette Academy, supra (warrant did not specify that only documents relating to federal loan program could be seized); Montilla Records of Puerto Rico, Inc. v. Morales, 575 F.2d 324 (1st Cir. 1978) (warrant did not specify that only records with Motown label could be seized); Vonder AHE v. Howland, 508 F.2d 364 (9th Cir. 1974) (warrant did not specify that only financial records of taxpayer could be seized but permitted seizure of all records, including personal letters); United States v. Klein, 565 F.2d 183 (1st Cir. 1977) (warrant not specific as to time); United States v. DeFalco, 509 F.Supp. 127 (S.D. Fla. 1981) (warrant did not specify which records or films could be seized but authorized seizure of anything reflecting conspiracy between 45 defendants).

In Application of Lafayette Academy, supra, the Department of Health, Education and Welfare, investigating a vocational home-study school for possible fraudulent practices incident to participation in the Federal Insured Student Loan Program, obtained a warrant that authorized seizure of the following items:

> "books, papers, rosters of students, letters, correspondence, documents, memoranda, contracts, agreements, ledgers, worksheets, books of account, student files, file jackets and contents, computer tapes/discs, computer operation manuals, computer tape logs, computer tape layouts, computer tape printouts, office of Education (HEW) documents and forms, cancellation reports and directives, reinstatement reports or forms, Government loan registers, refund ledgers, reports and notes, administrative reports, financial data cards, lesson and grading cards and registers, registration (corporations) documents, student collection reports, financial documents (corporations), journals of accounts and student survey data, which are and constitute

> evidence of the commission of violations of the laws of the United States, that is violation of 18 U.S.C., Sections 286, 287, 371, 1001 and 1014;..."
>
> 610 F.2d at 3.

The court held that the warrant lacked particularity because it did not specify "the precise nature of the fraud and conspiracy offenses" alleged, id., and also explained in a careful opinion that the warrant was overbroad:

> We have said that a principle [sic] deficiency here is the lack of particularity in the phrase which purports to qualify and delineate the generic categories of items: the description "books, papers... letters, correspondence, documents,... which are and constitute evidence of the commission of violations of the [federal conspiracy and fraud statutes]" provides insufficient guidance to the executing officer as to what items from among many he should seize. The qualifying phrase in effect does nothing to limit the broad warrant description. If, of course, the generic descriptions were sufficiently specific and particular standing alone, the defect in the qualifying phrase would be of no effect. For the most part, though, the categories listed here are too broad.

Certainly the description "books, papers ... letters, correspondence, documents, memoranda, contracts, agreements, ledgers, worksheets, books of account, ... computer tape/discs, ... computer tape logs, computer tape layouts, computer tape printouts,.. reports and notes, administrative reports, financial data cards... financial documents (corporations), journals of accounts" does not, standing along in the circumstances of this case, satisfy the fourth amendment. True, it could be argued that as the above description authorizes in effect the search and seizure of all books, papers, etc., the warrant does not suffer from a lack of particularity. The directions to the executing officer are straightforward-he is to cart away all documents. But while, so interpreted, the description would be particular enough, it would also be too broad to satisfy the probable cause requirements fo the fourth amendment. The affidavit does not establish probable cause to search and seize all of those items.

In contrast tothe broad categories of items set forth above, certain of the warrant items may be sufficiently particularized standing along, for example, "rosters of

> students," "student files, file jackets and contents," "lesson and grading cards and registers," "student collection reports," and "student survey data." However, while these documentary descriptions may be sufficiently specific, they cover documents antedating Lafayette Academy's participation in FISLP. According to the affidavit in support of the warrant, Lafayette Academy was organized as a correspondence school in 1969 but did not participate in FISLP until 1972. While the affidavit establishes the relevance of post-1972 student documents, it does not indicate any nexus between the earlier student documents and alleged criminal behavior. The warrant thus improperly authorizes the siezure of documents that are apparently irrelevant to the fraud.

Id. at 5-6 (footnote omitted).

In United States v. Abrams, supra, the Department of Health, Education and Welfare, investigating three doctors who, it believed, were submitting false Medicare bills, obtained a warrant that authorized seizure of the following items:

> [T]here is now being concealed certain property, namely evidence of a crime, to wit, certain business and billing and medical records of patients of Doctors Abrams, London, Braun, and Abrams, London and Associates, Inc. which show actual medical services performed and fraudulent services claimed to have been performed in a scheme to defraud the United States and to submit false medicare and medicaid claims for payments to the United States or its agents; in violation of Title 18, United States Code, Section 1001[.]
>
> 615 F.2d at 542.

The executing officers seized all of the doctors' Medicaid and Medicare records, and twenty records of patients who were neither Medicare or Medicaid recipients. The court held that the warrant was void for its lack of particularity:

> The warrant at issue fails to meet the requirement of particularity. The officers' discretion was unfettered, there is no limitation as to time and there is no description as to what specific records are to be seized. As a result of this general description, the executing officers seized all of the Medicare and

> Medicaid records of the three doctors and, in addition, records of the non-Medicare-Medicaid patients. It seems clear that the executing officers could not or made no attempt to distinguish bona fide records from fraudulent ones so they seized all of them in order that a detailed examination could be made later. This is exactly the kind of investigatory dragnet that the fourth amendment was designed to prevent.
>
> Id. 543 (footnote omitted).

Concurring, Judge CAMPBELL observed that the problem with the warrant was lack of particularity and overbreadth:

> Unless the necessary judgment is one the executing officers can be expected to perform reliably, a description identifying seizable items as any that constitute evidence of the particular fraud would seem too general. A related question is the extent to which a warrant may properly authorize the seizure of files containing a jumble of "innocent" as well as "guilty" materials. In the present case, the file of a Medicare-Medicaid patient obviously contains a good deal more material than that which bears on the padded reimbursement

claims of the physician. The latter presumably consists mainly of papers showing what actual medical services and procedures were provided, together with copies of the doctor's claim for monetary reimbursement. But the Physician may alos have retained in the file notes of patient complaints and history, and of his own diagnoses and evaluation. The file could include patient information of a very private nature. Compare Hawaii Psychiatric Association v. Aritoshi, 481 F.Supp. 1028 (D.C.Haw. 1979) (enjoining search, pursuant to state administrative warrant, of Medicaid psychiatric patient records). In cases of the present sort, I do not believe that a criminal warrant can properly direct the seizure of each Medicare-Medicaid patient's entire file in a doctor's office, with its mix of relevant and irrelevant materials. As discussed in Lafayette, such a warrant might be adequately particular, in that it would inform the executing officer precisely what to take (i.e., all files of Medicare-Medicais patients), but it would violate the probable cause requirement of the fourth amendment, since it would violate the probable cause requirement of the fourth amendment,

> since it would permit the indiscriminate seizure of irrelevant "innocent" materials of a confidential nature along with materials pertinent to the Medicare-Medicaid fraud being investigated.

Id. 548-9 (footnote omitted).

These decisions -- especially Abrams, which involved medical records and closely resembles the present case - demonstrate that the rationale of the lower court[6] -- that because the officers did not know which specific files to seize, they could seize them all -- cannot justify the warrant.

---

[6] The lower court said that:

> In the case at bar, the investigating officers were not blessed withspecific information concerning the names of all those to whom the Defendant might have illegally dispensed prescriptions or controlled substances. Rather, the investigation had proceeded to a point where a review of the Defendant's records was necessary. Thus, the warrants necessarily permitted the seizure of all the patients' records in order to determine whether and to what extent the probable illegal conduct existed.

Slip op. at 9.

We are especially persuaded of this conclusion in view of the fact, discussed above, that the officers had an excellent idea of what specific information they needed, and could easily have made the warrant much less broad, both as to which patients' files could be seized and as to the period of time. The warrant could have been restricted to medical records of the eight known individuals named in the affidavit; it could have been restricted to the medical records of the patients whose records were examined at the pharmacy; and it could have been limited as to time, by, for example, authorizing seizure of the medical records of only those persons who were patients during February 1978, or even during "the past 6 or 7 months." A similar observation regarding possible limitations on a warrant was made by the court in Abrams:

> In the first place, If an affidavit contains an averment by an employee that fraudulent practices were regularly pursued during his or her employment, and the term of such emplcyment is set forth, the warrant could authorize the seizure of all records of Medicare and Medicaid services billed and purportedly performed during that period. In the second place, if the means of identification required some analysis and matching, e.g., by comparing patients' invoices with records of actual tests performed, this is a sufficient guarantee of particularity. Should the process be deemed too disruptive by the occupant of the premises, he would have the option of agreeing that documents or copies thereof be taken from the premises for the necessary scrutiny. In other words, the person whose premises are to be searched could insist on a search in situ rigorously restricted to the directions in the warrant, with the right to consent to means less physically disruptive. Id. 545.

See also, United States v. Roche, supra; Montilla Records of Puerto Rico v. Morales, supra.

The Commonwealth has argued that the "special context exception" justifies the overbreadth of the warrant because "the health and welfare" of "third parties, the doctor's patients, (were) involved." Commonwealth's Brief at 8. This "exception" is less an exception than a "consideration." As the Commonwealth acknowledges, it has only been applied where "there was substantial evidence to support the belief that the class of contraband was on the premises and in practical terms the goods to be seized could not be precisely described." Montilla Records of Puerto Rico v. Morales, supra at 326. Furthermore, the Commonwealth fails to note that its argument has been consistently rejected

where contraband is not involved.[7] United States v. Abrams, supra (medical records); Montilla Records of Puerto Rico v. Morales, supra (record albums). As the court in

---

[7] The distinction between a search for contraband and a search for business records is an historic one. See Boyd v. United States, 116 U.S. 616 (1886). Until Warden v. Hayden, 387 U.S. 294 (1967), state agents could not search personnel or business files, as distinguished from the "fruits and instrumentalities of crime." It is for this reason that there are so few cases and "(t)he law is largely unformed in this difficult area." United States v. Abrams, supra at 549 (concurring op.).

Abrams said:

> Business records, although they may contain evidence of fraud, do not fall into the category of stolen or contraband goods. The government has cited no case and we have found none in which a seizure of all records was held valid pursuant to a generally worded warrant such as we have here.
>
> 615 F. 2d at 545.

The Commonwealth's argument proves too much. Almost every criminal case involves "the health and welfare" of "third parties." Thus, to accept the Commonwealth's argument would effectively eliminate the doctrine of overbreadth. A warrant could authorize the seizure of all of the personal possessions and records of every suspected murdere, rapist, or arsonist. The Commonwealth seems not to recognize that the purpose of the fourth amendment is not to protect "health and welfare" but

privacy. Here, the overwhelming number of appellant's partients - some 3,550 - had their personal medical files seized. These files were not introduced at trial, and one can only assume that they were unrelated to the crime under investigation. The state had no business knowing what these patients had told their doctor, and what maladies they had. See Stanford v. Texas, 379 U.S. 476 (1965) (fourth amendment accorded the "most scrupulous exactitude" when first amendment rights are involved); LaFave, 2 Search and Seizure 109 - 111 (1978).

The motion to suppress should have been granted, and we therefore order a new trial.

J. 2236/81-1

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR
	:	COURT OF
v.	:	PENNSYLVANIA
FLOYD SANTNER, M.D.,	:	No. 2361
Appellant	:	Phila., 1980

JUDGMENT

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of DELAWARE County be, and the MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED AND A NEW TRIAL IS ORDERED.

By the Court:

J. Haniel Henry
Prothonotary

Dated July 9, 1982

IN THE COURT OF COMMON PLEAS OF
DELAWARE COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : NO. 1123

VS. :

FLOYD A. SANTNER, M.D. : Of 1978

Kristine F. Hughey, Esquire, Assistant District Attorney

A. Charles Peruto, Esquire, Attorney for Defendant

OPINION

KELLY, J. FILED:

The Defendant, Floyd A. Santner, was arrested on February 28, 1978 and charged with Violations of Section 13 and 14 of the Controlled Substance, Drug, Device and Cosmetic Act, 35 Pa.C.S. §780-113(a)(13) and (14). Additionally, Defendant Santner was charged with conspiring to have his

Co-Defendants, Harrison Stone and John Sardar, practice medicine without a license. Sardar and Stone were also charged with a substantive count for allegedly practicing medicine without a license.

The case was tried before the Honorable Robert F. Kelly sitting with a Jury from September 10, 1979 until October 5, 1979, at which time the Jury returned a Guilty Verdict against Defendant Santner as to the Violations of Sections 13 and 14 of the Controlled Substance, Drug, Device and Cosmetic Act. The Jury acquitted Harrison Stone and John Sardar of all charges filed against them and also acquitted Defendant Santner of the charge of Conspiracy.

Defendant Santner filed Post-Trial Motions asserting that (1) The Court erred in denying his Pre-Trial Motion to Suppress Evidence; (2) that the evidence

was insufficient to support the verdicts; (3) that the Trial Court abused its discretion in admitting certain evidence at trial. Following the denial of Defendant's Post-Trial Motions, Judgment of Sentence was entered on October 14, 1980 from which Defendant has filed an Appeal.

Defendant's Pre-Trial Motion to Suppress Evidence was based on his twin claims that (1) the affidavit in support of the Search Warrant did not contain sufficient probable cause to permit their issuance; (2) that the Search Warrants themselves were defective in that they were overly broad in describing the items to be seized.

Although there is no exact formula for determining reasonable and probable cause, the standard must be applied to the totality of the circumstances rather than to each element relied upon

in support of a finding of probable cause. Even where no element by itself is sufficient, the volume of facts may yield sufficient basis for issuance of the Warrant. See Commonwealth v. Young, 222 Pa.Super. 355, 294 A.2d 785 (1972). Thus, it is clear that Defendant's analysis of the affidavit in support of the Search Warrant is too rigorous and fails to give adequate weight to the totality of the circumstances which were developed by the investigation and surveillance conducted prior to issuance of the warrant. The affidavit, signed by Officers John Falls and Joe Ceccola, members of the Upper Darby Police Department, assigned to Narcotic Investigations, stated as follows:

> "Within the past 6 or 7 months, numerous complaints were received from concerned citizens in the neighborhood that there was an inordinate amount of traffic by people in their teens, at the

above location, and these people would go into the above persons offices come out, congregate on the street, and would lay on the lawns and sidewalks in the area. The complainants indicated that they believed that the young people were taking some type of drugs. On numerous occasions the above officers conducted surveillances at the above location. On days of surveillances the above officers observed many people, some being in their teens. Many of the people in our opinion and experiences as narcotic officers, did appear to be under the influence of some type of drugs. Our surveillances further revealed that almost ninety-five percent of the people that entered and then left the above location went immediately to the Long Lane Court Pharmacy where, as we observed, the prescription written by the above person was tendered to and filled by the pharmacist. We also observed known drug users to this department, those being John Searle, Moe McNally, Greg Searle. On or about the first week of February, 1978, officer John Falls and other officers from this narcotic unit interviewed Mr. Walter Quinn and Raymond Freeberry, who are pharmacists at the Long Lane pharmacy. They permitted us to examine their records. Our personal examination of the records revealed the following: An excessive amount of class 11 drugs being prescribed by Dr. Floyd A. Santner for example from February 1, 1978 to February

24, 1978 15,901 Quaaludes were dispensed 3,129 Ritalins were dispensed, 903 Percodans were dispensed and 1,023 of other class 11 drugs were dispensed. The total of class 11 drugs dispensed in this 24 day period were 20,966. A check of other records showed that approximately 20,000 Quaaludes are being prescribed by Dr. Santner in an average months time. A check was made with Dr. Philip Ingaglio, who is the current Chairman of the board of physicians, who handles physician licensure for the State of Pennsylvania. Dr. Ingaglio indicated that the drugs prescribed wree, and the quantities prescribed as set forth above were outrageously large. Dr. Ingaglio also felt that this type of practice was not keeping within accepted medical standards. A check with 3 other pharmacies in the same general area revealed that the above quantities were also outrageously high. The above defendant also advertises, on his billing literature, a practice with a Dr. John Sardar M.D. A check of the records in Harrisburg, Pennsylvania concerning the licensing of physicians indicates that Dr. John Sardar is not licensed in the state of Pennsylvania to practice as a physician, and has never been licensed to practice. State Drug Investigation unit agent, Ester Kiah, went to the above location as a patient several times and each of the times was prescribed a class 2 drug. On February 27, 1978 the above officers interviewed a reliable confidential informant, who has given

these officers reliable information in the past, which has led to arrests and convictions, and he related the following. On several occasions he was a patient at Dr. Santner's office and he did receive Quaaludes, which he was not given a written prescription for, but was told to go to the Long Lane pharmacy to pick them up, which he did.

On February 27, 1978 the above officers interviewed one Hogan Jolly and Calvin Blackwell who are both patients of Dr. Floyd Santner M.D. and they related to these officers that are both drug addicted persons and are currently on methadone programs in the city of Philadelphia. Both are obtaining class 2 drugs from Dr. Santner.

On February 27, 1978 the above officers also interviewed one Cheryl Rementer and she told us that she went to Dr. Santner last year, when she was 15 years of age and told Dr. Santner that she had problems sleeping at night and Dr. Santner prescribed Quaaludes for her. She stated that she went there because her friends told her its easy to get Quaaludes from Dr. Santner.

Based on the foregoing we have reason to believe that the above person at the above location has violated the laws of Pennsylvania dealing with the licensed practice of medicine and the manner in which the practice is to be conducted in that he has conspired with John Sardar and Harrison G. Stone and

> to allow them to practice without a license, and based on the quantity of traffic into and from the above office, by surveillance, our examination of pharmacy records and our conversation with the referenced physicians, we believe the above Dr. Santner, is prescribing controlled substances for known addicts and controlled substances not being for maintainance for their addiction. These controlled substances or other drugs being prescribed are not in good faith in the course of his professional practice."

The totality of the circumstances, as revealed by the observations and investigations of the affiants, demonstrated, in a compelling way, that probable cuase existed to believe that the Defendant was engaged in activity in violation of the Controlled Substance, Drug, Device and Cosmetic Act and that a search of his offices would provide documentation for establishing these illegal practices.

Relying primarily upon Montilla Records, Inc. v. Morales, 575 F.2d 324 (1st Cir. 1978), VonderAhe v. Howland, 508 F.2d 364 (9th Cir. 1974); and United States v. Abrams, 615 F.2d 541 (1st Cir. 1980),

Defendant claims that the Search Warrants at issue in this case which permitted the seizure of all patients' records from the office of Dr. Santner, was overbroad. However, each of these cases demonstrates that the information upon which the Search Warrants were based provided the police with information sufficient to restrict the search to a more narrow area than that which was permitted by the Search Warrants.

In Montilla Records, although the defendant Corporation was allegedly engaged in the unlawful manufacturing and distribution of recordings which were the property of Motown Corporation, the Warrant permitted the seizure of "all records" relating to the manufacture of unauthorized sound recordings. The United States Court of Appeals for the 1st Circuit noted that, since the warrant was not limited to recordings bearing the Motown Lable, the executing officers had unfettered discretions

in determining what items should be seized. In VonderAhe, a former employee of the Defendant dentist had reported to the Internal Revenue Service that the Doctor kept two sets of books, describing the books and records which had been taken from the dentist's office to his home, with particularity. Finding that the items to be sought were known to the Internal Revenue Service with a high degree of specificity, the United States Court of Appeals for the 9th Circuit found that the Search Warrant, which allowed seizure of the Defendant's "fiscal record...since 1966," was overbroad.

United States v. Abrams, involved a case of alleged Medicare fraud. The Court there found that the Search Warrant was impermissibly broad since it permitted the seizure of files other than those of Medicare patients. In a separate concurring opinion, Judge Campbell noted, however, as follows:

> while...a warrant authorizing seizure of entire files would be improper in a case like this, it might be proper

> in cases involving a largely or wholly illicit business-such as an illegal drug manufacturing concern. In such cases, even if the files turn out to contain much irrelevant or innocent material, the predominantly illegal character of the enterprise could provide probable cuase to seize entire files.

Id. at 549, n. 1.

In the case at bar, the investigating officers were not blessed with specific information concerning the names of all those to whom the Defendant might have illegally dispensed prescriptions or controlled substances. Rather, the investigations had proceeded to a point where a review of the Defendant's records was necessary. Thus, the warrants necessarily permitted the seizure of all paitents' records in order to determine whether and to what extent the probable illegal conduct existed.

In determining the sufficiency of the evidence to support the conviction of the Defendant for violation of Section 13 and 14 of the Controlled Substance, Drug, Device and Cosmetic Act, the evidence is

to be viewed in the light most favorable to the Commonwealth, drawing all reasonable inferences favorable to the Prosecution. Commonwealth v. Smith, 484 Pa. 71, 398 A.2d 948 (1979).

With respect to the violation of Subsection 13 of the Act, 35 Pa.C.S. §780-113(a)(13), Defendant does not deny that he dispensed prescriptions for controlled substances. Rather, with respect to the various specific incidents revealed at trial, he denies either that he knew or had reason to know that each of the individuals to whom he dispensed the prescriptions was drug dependent or that, despite the drug dependency, the prescription was dispensed for the proper treatment of a malady other than drug dependency.

That the Defendant knew or had reason to know that a significant number of his patients to whom he dispensed prescriptions for controlled substances were drug dependent, can be inferred from the testimony of several

witnesses including the Defendant's receptionist, the Long Lane Court pharmacist and Defendant's patients. Dorothy Taylor, the receptionist for Dr. Santner during 1976 and 1977 testified that she "noticed that a lot of the patients that came in were very glassy-eyed, tired-looking, falling all over the place, bumping into things. They spoke with slurred voices." (N.T. at 7:97). Mr. Quinn, the pharmacist at Long Lane Court Pharmacy, testified that he turned some of Defendant's patients away and refused to fill their prescriptions when they "stumbled around a little bit and just acted a little bit unusual." (N.T. 5:192). Mrs. Taylor further testified that Susan Devine, a patient for whom Dr. Santner prescribed several controlled substances including Quaaludes and Valium, admitted that she was on a methadone program and that Ms. Devine had reported this fact to Dr. Santner. (N.T. 7:130, 134).

Cheryl Rementer, a patient of the Defendant, testified that she knew of other patients who received prescriptions from the Defendant when they visited his office on a "high." (N.T. 5:69). She further testified that she herself was a Quaalude user before seeing Dr. Santner and that she first went to see him without an appointment in order to get more Quaaludes (N.T. 5:58). She testified that she was aware of other individuals who sometimes went to the Defendant's office merely to get prescriptions (N.T. 5:95), and she named eleven (11) individuals who, after receiving a prescription from the Defendant, sold the pills to her. (N.T. 5:100-102).

Defendant correctly points out that he noted in the files of some of his patients that they should no longer receive controlled substances due to the danger of drug abuse by such individuals. In each of these cases, however, the Defendant prescribed a controlled substance either on the day of, or shortly after, the notation to the contrary. (Exhibit

F-22, N.T. 9:28; Exhibit F-29, N.T. 9:80; Exhibit F-38, N.T. 9:18; Exhibit F-39, N.T. 9:134; Exhibit F-46, N.T. 10: 137; Exhibit F-48, N.T. 11:87: Exhibit F-49, N.T. 11:116). Contrary to Defendant's contention, therefore, the files reinforce the fact, as found by the jury, that the Defendant continued to prescribe controlled substances to individuals despite an awareness of their drug dependence.

In order to establish that the notations in the patient files of Defendant, which note an alleged malady for which controlled substances were prescribed, were not made in good faith and, indeed, were contrived, the Commonwealth presented evidence regarding the high volume of patient traffic in Dr. Santner's office during 1977 and the hugh volume of controlled substances prescribed by Dr. Santner from May, 1977 to March, 1978. The testimony of Dorothy Taylor with respect to Defendant's appointments indicated that, excluding those individuals who may have

showed up without appointments, the Defendant allotted only three minutes per patient on numerous occasions. (N.T. 7:167). Defendant's failure to take the time necessary to adequately examine, consider and treat his alleged patients, together with the high volume of prescriptions for controlled substances and the use of stock phrases in his patient notes as diagnostic justification for the treatment afforded the individuals, lead to the permissible inference that the defendant was not engaged in the legitimate treatment of his clientele for non-drug related ailments. This inference was reinforced by the expert testimony of Dr. Kool, following a review of the fifty (50) files comprising Exhibit C-F, 1-50, which indicated that some of the patients were definitely drug dependent (N.T. 16:31). The Commonwealth need not exclude every reasonable explanation of a defendant's activities in order to sustain a conviction; the question of

doubt is for the jury. Commonwealth v. Sullivan, 472 Pa. 129, 371 A.2d 468 (1977). While guilt may never rest on mere conjecture or surmise, a conviction may stand on circumstantial evidence where the circumstances are consistent with criminal activity, even though a jury may likewise have been able to find that the behavior was altogether innocent. Commonwealth v. Moore, 226 Pa.Super. 32, 311 A.2d 704 (1973).

In order to establish a violation of Subsection 14 of the Controlled Substance, Drug, Device and Cosmetic Act, the Commonwealth need only show either that (1) the Defendant did not prescribe controlled substances in good faith; (2) that the Defendant did not prescribe controlled substances within the scope of a Doctor-Patient relationship; or (3) the Defendant did not prescribe drugs in accordance with treatment principles accepted by a responsible segment of the medical profession. A showing of any one of these elements would suffice to

establish a violation of the Subsection. Commonwealth v. West, ___ Pa.Super. ___, 441 A.2d 537 (1979).

The absence of good faith may have been inferred by the jury, as was pointed out by Dr. Kool, by the meager information in the patient files, the absence of variation on diagnoses, the absence of individuals treatment, and the fact that the prescriptions showed no gradual increase or decrease in dosages but were uniform over extended periods of time. (N.T. 16:38-42). The following specific cases are also quite telling in this regard: (1) one patient was prescribed a total of 1,721 pills comprised of ten (10) different types of drugs of which at least six were maximum dosages for the type of medication prescribed, in a period of just under one year (N.T. 6:10); (2) another patient, over a nine month time period, received prescriptions for thirty-five (35) separate drugs including two and one-half (2 1/2)

quarts of codeine-containing cough medicine (N.T. 5:175-178); (3) a third patient was dispensed 1,728 pills, including 438 maximum dosage Quaalude tablets which were prescribed to be taken one per day, in a period of just under one year (N.T. 6:45); and (4) a fourth patient was prescribed 1,887 pills, of which 390 were maximum dosage Quaalude tablets and 840 were maximum dosage Valium tablets over a period of 360 days (N.T. 6:31).

That the treatment of his clientele was not within the scope of a doctor-patient relation is evidenced, not only by the fact that individuals were routinely hussled in and out of the Defendant's office in quick fashion, but also from the testimony of Dr. Kool, who indicated that the treatment was, in several cases obviously not in the patient's best interest, demonstrating inadequate follow-up, a lack of alteration in medication and an absence of adequate explanations for the treatment given.

In order to establish that the Defendant did not prescribe drugs in accordance with treatment principles accepted by a responsible segment of the medical profession, Dr. Rial, a family practice physician, testified on behalf of the Commonwealth. He emphasized the need to be familiar with a patient's history when prescribing treatment of any kind, and concluded that the sample of Defendant's files, which he reviewed, contained inadequate histories to justify the treatment prescribed. (N.T. 15:50). Dr. Rial further commented on the potential for abuse regarding both Quaalude and Doriden, and opined that the Defendant relied too heavily upon prescriptions for drugs which are seldomly prescribed by most doctors. (N.T. 15:49, 69). He also expressed concern that, in spite of indications in several of the files reviewed that the patient was no longer to be given Quaalude, there were subsequent prescriptions for the drug (N.T. 15:70).

Dr. Reiders, a Toxicologist and Pharmacologist, testified on behalf of the Commonwealth and stated that he believed Quaalude should not be prescribed for a period in excess of three months (N.T. 14: 77), and that cough syrups, containing codeine should also be restricted to short periods of time. (N.T. 14:89). Dr. Scheindlin, an expert testifying on behalf of the Defendant, concurred with the opinion of Dr. REiders that use of Quaaludes above three months is not recommended, referring for this principle to the Physician's Desk Reference. (N.T. 20:20).

While counsel for Defendant engaged in vigorous cross-examination of the expert witnesses who testified on behalf of the Commonwealth and even presented testimony on behalf of the Defendant himself, the weight to be given to the testimony of the various witnesses was clearly a matter to be determined by the jury.

Commonwealth v. Woodhouse, 401 Pa. 242, 164 A.2d 98 (1960).

Similarily, Defendants claim that the Court abused its discretion in admitting certain testimony, is actually directed towards the weight to be given to the testimony rather than the propriety of the testimony itself. The testimony of neighbors regarding the types of people seen in and about the Defendant's office was proffered along with the testimony of the receptionist and pharmacist, in order to demonstrate that the Defendant had reason to know that a significant number of his patients were drug dependent.

Defendant attacks the testimony with respect to the volume of Defendant's prescriptions for controlled substances on the basis that the volume is largely dependent upon the case load of each individual physician and his type of practice.

These points were, however, adequately made in cross-examination and were to be determined by the Jury as fact-finder. Similarily, Defendant does not object to the credentials of either expert who testified on behalf of the Commonwealth, rather, he argues that their opinion should not be credited, an argument which was properly made to and rejected by, the fact-finder.

Finally, the Defendant objects to the testimony of John Searle, a patient of the Defendant who testified as a rebuttal witness on behalf of the Commonwealth. Mr. Searle testified that he visited the Defendant in order to obtain a prescription for controlled substances and admitted that he had advised the Defendant of his addiction to heroin during his second office visit (N.T. 22: 132, 144). While he acknowledged that he complained of nervousness, sleeplessness,

high blood pressure and hypertension, which the Defendant may have properly treated, it was for the Jury to determine whether the treatment afforded him was actually for these maladies or, in fact, due to Mr. Searle's drug dependency..

For all the above reasons, Defendant's Post Trial Motions were Denied.

BY THE COURT:

_____

J.

IN THE COURT OF COMMON PLEAS
OF DELAWARE COUNTY,
PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA: NO.1123-78

VS. :

FLOYD SANTNER, M.D. :

Kristine F. Hughey, Esquire, Assistant
District Attorney
A. Charles Peruto, Esquire, Attorney
for Defendant

ORDER

AND NOW, to wit, this 21st day of July, 1980, upon consideration of Defendant's Motions for a New Trial and In Arrest of Judgment together with the briefs submitted in support and opposition thereto, it is hereby ORDERED and DECREED that said Motions are DENIED.

Defendant shall appear in Court Room 1 on Tuesday at 10:00 the 19th day of August, 1980, for sentencing.

BY THE COURT:

Robert F. Kelly

Supreme Court of Pennsylvania

MARLENE F. LACHMAN, Esq.
PROTHONOTARY
PATRICK TASSOS
DEPUTY PROTHONOTARY

Eastern District

468 CITY HALL
PHILADELPHIA, PA 19107
(215) 686-4500

March 3, 1983

John Reilly, Esq.
District Attorney
Delaware County Courthouse
Media, PA 19063

In Re: Commonwealth v. Floyd A. Santner, M.D.
No. 461 E.D. Allocatur Docket, 1982

Dear Mr. Reilly:

This to advise you that your Petition for Allowance of Appeal filed in the above-captioned matter was denied by the Court on March 3, 1983.

Very truly yours,

Marlene F. Lachman

Marlene F. Lachman, Esq.
Prothonotary

"Appendix D"

61a

Supreme Court of Pennsylvania

MARLENE F. LACHMAN, Esq.
PROTHONOTARY
PATRICK TASSOS
DEPUTY PROTHONOTARY

Eastern District

468 CITY HALL
PHILADELPHIA, PA 19107
(215) 686-4600

May 18, 1983

John A. Reilly, Esq.
District Attorney
Delaware County Courthouse
Media, PA 19063

In Re: Commonwealth v. Floyd A. Santner, M.D.
No. 461 E.D. Allocatur Docket, 1982

Dear Mr. Reilly:

This is to advise you that your Application for Reconsideration filed in the above-captioned matter was denied by the Court on May 18, 1983.

Very truly yours,

Patrick Tassos

Patrick Tassos
Deputy Prothonotary

"Appendix E"